## Sukma Darmawan Sasmitaat Madja v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–05–34 OF 1999

GOPAL SRI RAM, HASHIM YUSOFF AND JAMES FOONG JJCA

22 JUNE 2006

*Criminal Procedure — Appeal — Evidence — Findings by Federal Court in favour of instant accused on admissibility of his confession — Whether constituted an issue estoppel against public prosecutor*

*Criminal Procedure — Plea of guilty — Statement of facts — Prosecution had in its possession evidence favourable to defence — Sessions judge was denied access to information favourable to accused — Plea of guilt also alleged to have been induced by illegitimate pressure — Supervisory jurisdiction of High Court — Courts of Judicature Act 1964 s 35(1)*

The accused/appellant was charged with the offence of gross indecency contrary to s 377D of the Penal Code. After admitting to the statement of facts, the accused was found guilty and convicted by the court. At the conclusion of the plea in mitigation, the deputy public prosecutor left the question of sentence to the court. At this juncture Mr Zulkifly Noordin intervened and informed the court that he had been engaged by the accused's family to represent him. He also said that the accused's family disputed that the accused had engaged counsel who appeared at the Bar of the court. He wished to address the court. The learned deputy argued that what Mr Zulkifly Noordin proposed to do did not accord with the ethics of the profession. The sessions judge refused to permit Mr Zulkifly Noordin to address her any further and proceeded to pass sentence. The notice of appeal was lodged within the time limited by s 307(1) of the Criminal Procedure Code ('the CPC') but the appellant did not file his petition within the ten days prescribed by CPC s 307(4) because the two vital documents on which the sessions court based its decision - the confession and the statement of facts were not provided to him until 8 December 1998. The accused was compelled to apply for an extension of time because the sessions court took the position that as the petition of appeal had not been filed within 10 days of the supplying of the notes of evidence and the grounds of judgment, the appeal was no longer extant. The high court, however, dismissed the accused's application by treating the matter as one falling within the discretion of the court. According to the appellant's affidavit evidence to support of his application for revision was that his plea of guilt was involuntary in that it was not the product of a free mind but that of a mind tainted by oppression and coercion brought to bear on it by the police in whose custody he was for a period of 14 days immediately preceding his appearance before the sessions court.

**Held**, allowing the appeal:

(1) Since the petition could, as a matter of law, had been filed within 10 days from 8 December 1998, the learned judge ought to have treated the application for extension as a mere formality and the so called delay as de minimis. Instead he was looking for an explanation for the so-called delay and for a draft petition so that he could properly exercise his discretion. This was an error on his part, one that had occasioned a miscarriage of justice. If this were an appeal confined to that decision of the High Court, it would have been a matter of simply allowing the appeal and remitting the matter for hearing of the substantive appeal. Before the learned judge, the conviction was attacked by way of an application under s 35 of the Courts of Judicature Act 1964 (see paras 5–6).

(2) There was evidence placed before the High Court that at the time when the accused pleaded guilty the prosecution had in their possession material which, at the very least, cast a doubt on the guilt of the accused. The material in question was a medical report by a government doctor who had examined the accused. In his report he said that there were no signs of any penetration in the accused's anus, whether recent or old. The prosecution had in its possession evidence favourable to the defence. The sessions judge was denied access to information favourable to the accused. Had it been made available to her, she might well have rejected the plea of guilt on the ground that an offence might not have been committed for the want of proof of an essential allegation in the charge. For it is trite law that in a case where an accused pleads guilty, the prosecution when reciting the facts, confine itself to only those facts it can prove (see paras 9–10).

(3) There could be no clearer case of an injustice where the plea of guilt was alleged to have been induced by illegitimate pressure. Accordingly the submission by the learned deputy that affidavits were inadmissible in revision proceedings even to demonstrate a miscarriage of justice could not be accepted. More so in this case where the prosecution itself had said that it had no objections to the deponents of affidavits filed on the public prosecutor's behalf. Although the learned judge mentioned s 35(1) of the Courts of Judicature Act, a reading of the judgment under appeal leaves with the impression that he did not really appreciate the nature and object of the wider supervisory jurisdiction conferred on the high court by that section. The supervisory jurisdiction of the High Court conferred by s 35(1) exists to correct a miscarriage of justice. And it is central to the exercise of that power that an applicant be permitted to bring matters of complaint to the High Court by way of affidavit evidence (see paras 17–18).

(4) An appeal on another prosecution brought against the instant accused and Dato' Seri Anwar Ibrahim for committing sodomy to the Federal Court succeeded. It found the confession to have been obtained in unusual circumstances. It is trite that an appellate court must decide a case in the light of the circumstances existing as at the date on which the appeal is heard. The findings by the Federal Court in favour of the instant accused on the admissibility of his confession constituted an issue estoppel against the public prosecutor. The narrower pleas of autrefois acquit and convict that are housed in s 302 of the CPC and art 7(2) of the Federal Constitution did not exclude

the application of the wider doctrine of issue estoppel to criminal cases (see paras 19, 22 & 25); *Lalta v State of Uttar Pradesh* AIR [1970] SC 1381; *Ravinder Singh v State of Haryana* AIR [1975] SC 856; *Dal Chand v State of Uttar Pradesh* [2000] Cri LJ 4579 referred.

**[Bahasa Malaysia summary**

Tertuduh/perayu dituduh dengan kesalahan kelucahan melampau bertentangan dengan s 377D Kanun Keseksaan. Selepas mengakui pernyataan fakta-fakta, tertuduh didapati bersalah dan disabitkan oleh mahkamah. Pada penutup hujah meringankan hukuman, penolong pendakwa raya telah meninggalkan soalan hukuman kepada mahkamah. Pada waktu ini, En Zulkifly Noordin mencelah dan memberitahu mahkamah bahawa beliau telah dilantik oleh keluarga tertuduh untuk mewakilinya. Beliau juga memberitahu mahkamah bahawa keluarga tertuduh bertikai bahawa perayu telah melantik seorang peguam untuk mewakilinya. Dan beliau ingin berucap di mahkamah. Penolong pendakwa raya yang bijaksana berhujah bahawa apa yang En Zulkifly Noordin ingin lakukan tidak mengikut etika profesyen. Hakim sesyen enggan membenarkan En Zulkifly Noordin menghadapi mahkamah dan terus menjatuhkan hukuman. Notis rayuan difailkan dalam masa yang telah ditetapkan oleh s 307(1) Kanun Acara Jenayah ('KAJ') tetapi perayu tidak memfailkan petisyennya dalam masa sepuluh hari seperti yang ditetapkan oleh KAJ s 307(4) oleh kerana dua dokumen-dokumen penting yang mana mahkamah sesyen berdasarkan keputusannya — pengakuan dan pernyataan fakta-fakta tidak dibekalkan kepadanya sehingga 8 Disember 1998. Tertuduh terpaksa memohon untuk lanjutan masa oleh kerana mahkamah sesyen mengambil kedudukan bahawa petisyen rayuan telah tidak difailkan dalam masa 10 hari dari tarikh nota-nota keterangan dan alasan-alasan penghakiman dibekalkan, rayuan tersebut tidak lagi wujud. Akan tetapi, mahkamah tinggi telah menolak permohonan tertuduh dengan menyifatkan perkara itu sebagai satu yang jatuh ke bawah budi bicara mahkamah. Mengikut keterangan afidavit perayu untuk menyokong permohonannya untuk penyemakan adalah bahawa pengakuan salahnya adalah tanpa sukarela iaitu bukan hasil daripada kebebasan minda sendiri tetapi daripada minda yang telah dicemari oleh penindasan dan paksaan oleh polis di mana perayu berada di bawah kustodi untuk jangkamasa 14 hari selepas sahaja perayu dibawa menghadap ke mahkamah sesyen.

**Diputuskan**, membenarkan rayuan tersebut:

(1) Oleh kerana petisyen tersebut boleh, berdasarkan undang-undang, difailkan dalam jangkamasa sepuluh hari dari 8 Disember 1998, hakim mahkamah sepatutnya menyifatkan permohonan untuk melanjutkan masa sebagai hanya satu formaliti dan kelewatan yang dikatakan itu adalah de minimis. Akan tetapi beliau telah mencari alasan untuk kelewatan yang dikatakan itu dan untuk satu draf petisyen supaya beliau dapat menggunakan budi bicaranya. Ini merupakan satu kesilapan dipihaknya, satu kesilapan yang telah menyebabkan satu ketidakadilan. Sekiranya ini adalah satu rayuan yang terbatas kepada keputusan mahkamah tinggi, ia akan menjadi satu perkara di mana rayuan hanya perlu dibenarkan dan dihantar semula perkara tersebut

untuk pendengaran rayuan substantif. Sabitan tersebut telah dipertikaikan di hadapan hakim yang bijaksana melalui permohonan di bawah s 35 Akta Kehakiman Mahkamah 1964 (lihat perenggan 5–6).

(2) Terdapat bukti sebelum mahkamah tinggi di mana pada masa tertuduh mengaku salah pendakwa raya mempunyai dalam milikan mereka bahan yang mana, paling kurangnya, menimbulkan keraguan atas kebersalahan tertuduh. Bahan tersebut adalah satu laporan perubatan oleh doktor kerajaan yang telah memeriksa tertuduh. Dalam laporannya beliau menyatakan bahawa tiada tanda-tanda tembusan ke dalam dubur tertuduh, sama ada baru atau lama. Pihak pendakwa memiliki bukti yang memihak kepada pembelaan. Hakim mahkamah sesyen tidak diberikan peluang kepada maklumat yang memihak kepada tertuduh. Sekiranya dibekalkan kepadanya, beliau berkemungkinan menolak pengakuan bersalah tersebut atas alasan bahawa kesalahan tersebut berkemungkinan tidak berlaku oleh kerana ketiadaan satu bukti yang penting tuduhan yang dikatakan itu. Ia adalah undang-undang tetap di mana dalam satu kes yang tertuduh mengaku bersalah, apabila pendakwa raya memberikan fakta-fakta, patut memberikan fakta-fakta yang ia dapat buktikan (lihat perenggan 9–10).

(3) Tiada kes yang lebih jelas akan satu ketidakadilan di mana pengakuan bersalah yang dikatakan itu dipengaruhi secara paksaan yang tak sah. Hujahan penolong pendakwa raya yang menyatakan bahawa afidavit-afidavit tersebut adalah tidak boleh diterima di dalam prosiding penyemakan walaupun untuk menunjukkan satu ketidakadilan tidak dapat diterima. Lebih-lebih lagi dalam kes ini di mana pendakwa raya sendiri menyatakan bahawa ia tiada bantahan-bantahan terhadap deponen-deponen afidavit-afidavit yang difailkan bagi pihak pendakwa raya. Walaupun hakim yang bijaksana menyebut s 35(1) Akta Kehakiman Mahkamah, satu bacaan penghakiman di bawah rayuan memberi gambaran bahawa beliau tidak begitu memahami sifat dan objek bidang kuasa penyeliaan yang lebih luas yang diberikan kepada mahkamah tinggi oleh s 35(1) wujud untuk membetulkan ketidakadilan. Dan ia adalah penting dalam menggunakan kuasa tersebut pemohon dibenarkan membawa perkara-perkara yang diadu ke Mahkamah Tinggi melalui keterangan afidavit (lihat perenggan 17–18).

(4) Satu rayuan terhadap pendakwaan yang dibawa terhadap perayu di sini dan Dato' Seri Anwar Ibrahim kerana melakukan liwat ke Mahkamah Persekutuan telah dibenarkan. Ia mendapati bahawa pengakuan telah diperolehi dalam keadaan yang agak luar biasa. Ia adalah undang-undang tetap bahawa mahkamah yang dirayu harus memutuskan kes tersebut berdasarkan keadaan-keadaan yang wujud pada tarikh di mana rayuan tersebut didengar. Penemuan Mahkamah Persekutuan yang memihak kepada perayu di sini atas penerimaan pengakuannya itu membentuk satu isu estoppels terhadap pendakwa raya. Pengakuan yang terhad autrefois acquit atau convict yang terkandung di dalam s 302 KAJ dan perkara 7(2) Perlembagaan Persekutuan tidak mengecualikan pemakaian doktrin isu estoppel yang lebih luas kepada kes-kes jenayah (lihat perenggan 19, 22 & 25); *Lalta v State of Uttar Pradesh* AIR [1970] SC 1381; *Ravinder Singh v State of Haryana* AIR [1975] SC 856; *Dal Chand v State of Uttar Pradesh* [2000] Cri LJ 4579 dirujuk.]

**Notes**

For cases on evidence, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 349–394.
For cases on statement of facts, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2667–2673.

**Cases referred to**

*Abdul Kadir bin Abdul Rahman v PP* [1984] 1 MLJ 80 (refd)
*Alfred Golathan* [1915] 11 Cr App R 79 (refd)
*Chen Chong & Ors v PP* [1967] 2 MLJ 130 (refd)
*Christopher Ingleson* [1914] 11 Cr App R 21 (refd)
*Chunbidya, In re & Ors* [1934] 62 IA 36 (refd)
*Dal Chand v State of Uttar Pradesh* [2000] Cri LJ 4579 (refd)
*Dallison v Caffrey* [1965] 1 QB 348 (refd)
*Dato Seri Anwar Ibrahim v PP & Another Appeal* [2004] 3 MLJ 405 (refd)
*Goh Keat Peng v PP* [2001] 3 MLJ 172 (refd)
*Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254 (refd)
*Heng Kim Khoon v PP* [1972] 1 MLJ 30 (refd)
*Jumari bin Mohamed* [1982] 1 MLJ 282 (refd)
*King, The v Wilkes* 77 CLR 511 (refd)
*Ku Izham bin Ku Adnan v PP* [1998] 5 MLJ 720 (refd)
*Lalta v State of Uttar Pradesh* AIR [1970] SC 1381 (refd)
*Lee Boon Gan (f) v Regina* [1955] MLJ 103 (refd)
*Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69 (refd)
*Manokaran & Anor v PP* [1979] 1 MLJ 262 (refd)
*Marz v The Queen* 96 CLR 62 (refd)
*Masnelan Pakpahan v PP* [1989] 2 MLJ 362 (refd)
*Mohammad bin Hassan v PP* [1998] 5 MLJ 65 (refd)
*National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41 (refd)
*PP v Audrey Keong Mei Cheng* [1997] 3 MLJ 477 (refd)
*PP v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116 (refd)
*PP v Soon Seng Sia Heng* [1979] 2 MLJ 170 (refd)
*PP v Sundaravelu* [1967] 1 MLJ 79 (refd)
*PP v Lee Eng Kooi* [1993] 2 MLJ 322 (refd)
*PP v Tan Tho Kim* [1978] 2 MLJ 65 (refd)
*Ravinder Singh v State of Haryana* AIR [1975] SC 856 (refd)
*Queen, The v Ollis* [1900] 2 QB 758 (refd)
*Veerasingam v PP* [1958] MLJ 76 (refd)
*Wong Swee Chin v PP* [1977] 2 MLJ 194 (refd)
*Wong Swee Chin @ Botak Chin v PP* [1979] 2 MLJ 207 (refd)

**Legislation referred to**

Courts of Judicature Act 1964 s 35(1)
Criminal Procedure Code ss 302, 305, 307(1), (4), 310, 317, 323, 325, 326, 424
Criminal Procedure Code [India] s 403
Federal Constitution art 7(2)
Internal Security Act 1960
Penal Code s 377D

**Appeal from**: Criminal Application No 44–116 of 1998 (High Court, Kuala Lumpur)

*Gobind Singh Deo (Karpal Singh & Co) for the appellant.*
*Nurulhuda Nur'aini Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Gopal Sri Ram JCA (delivering judgment of the court):**

**[1]** The accused (and that is how we will refer to the appellant, Sukma Darmawan Sasmitaat Madja), was charged with the offence of gross indecency contrary to s 377D of the Penal Code. The charge goes on to describe the act of gross indecency as follows, namely, that the accused permitted one Dato Seri Anwar Ibrahim to insert his penis into his (the accused's) anus.

**[2]** The charge alleges the offence to have taken place in April 1998. On 19 September 1998, the accused was produced before the sessions court at Kuala Lumpur. According to the record of the sessions court this is what happened. The charge was read to the accused. He pleaded guilty. The court then explained the nature and consequences of the plea. The accused nevertheless unconditionally maintained his plea of guilt and understood the nature and consequences of his plea. The prosecution then produced a statement of the facts of the case which were marked as exh P1. The accused admitted the facts. He was found guilty and convicted by the court. At that stage of the proceedings, one Mr Zulkifli bin Noordin, an advocate, addressed the court. He said that he had been retained by the accused's family. He asked the court's permission to meet with the accused as the accused's family had not met with him, presumably during the period of his police custody. The sessions judge however indicated that she would proceed to hear the plea in mitigation. In the course of his plea in mitigation, counsel who purported to appear for the accused (we will explain later why we use the expression 'purported') put in a confession made by accused to a magistrate. In that confession the accused not only admitted the act specified in the charge but other acts of gross indecency as well. During his address, counsel informed the court that the accused had telephoned him the previous day and counsel had proceeded forthwith to meet with the accused. He spent about three hours with the accused during which time the accused had given him certain information about himself. At this point it is important to remind ourselves that the accused had been in police custody at the time he met with counsel.

**[3]** At the conclusion of the plea in mitigation, the deputy public prosecutor who appeared for the prosecution left the question of sentence to the court. At this juncture Mr Zulkifly Noordin intervened and informed the court that he had been engaged by the accused's family to represent him. He also said that the accused's family disputed that the accused had engaged counsel who appeared at the Bar of the court. He wished to address the court. The learned deputy argued that what Mr Zulkifly Noordin proposed to do did not accord with the ethics of the profession. The sessions judge refused to permit Mr Zulkifly Noordin to address her any further and proceeded to pass sentence. She sentenced the accused to six months

imprisonment from the date of his arrest. After he had served a substantial part of his sentence, the accused was released on bail.

**[4]** The accused wanted to appeal against the decision of the sessions court. He lodged his notice of appeal within the time limited by s 307(1) of the Criminal Procedure Code ('the CPC'). But he could not file his petition within the ten days prescribed by CPC s 307(4) because the two vital documents on which the sessions court based its decision — the confession and the statement of facts (exh P1) — were not provided to him until 8 December 1998. In accordance with the judgment of Abdul Razak J in *Public Prosecutor v Tan Tho Kim* [1978] 2 MLJ 65, time only began to run from 8 December 1998. That was correctly conceded by the learned deputy who appeared before the High Court. Strictly speaking, it was therefore not necessary for the accused to have applied for an extension of time. But he was compelled to do so because the sessions court took the position that as the petition of appeal had not been filed within 10 days of the supplying of the notes of evidence and the grounds of judgment, the appeal was no longer extant. Hence, on 10 December the accused applied for extension of time. The High Court, however, dismissed the accused's application by treating the matter as one falling within the discretion of the court. This is how the learned judge put it:

> A copy of the proposed petition of appeal would be useful in order to see what the grounds and law involved, so as to determine whether the two weeks from the date of this Court's order is justified. While of course it would be unreasonable to expect the applicant to have exhibited the proposed petition of appeal when the application was filed on 10 December 1998, there is nothing to stop the applicant from filing the document later as was done for the affidavits of Dr Zahari Noor and Dato' Seri Anwar Ibrahim which were filed on 22 January 1999 and 31 December 1998 respectively. There is therefore no reasonable excuse why the proposed petition of appeal was not filed, and the court does not have the benefit of it to help it determine the appropriate period of extension.
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> In *Masnelan Pakpahan v Public Prosecutor* [1989] 2 MLJ 362 Mohd Dzaiddin J (as he then was) held:
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> > ... the underlying principle of s 310 of the Criminal Procedure Code is to allow a judge to exercise his unfettered discretion to see that substantial justice may be done in the matter. In the final analysis, the exercise of the discretion depends on the facts and circumstances of each case... it is insufficient for the deponent to state that he believes there are strong grounds in the appeal on the merits and in law without at least mentioning what the grounds are and the law involved. He ought to have exhibited to his affidavit a proposed petition of appeal...
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> > The only fetter upon the exercise of the discretion of the judge to grant an extension under s 310 is that 'in order that substantial justice be done': see *Jumari bin Mohamed v Public Prosecutor* [1982] 1 MLJ 282; *Veerasingam v Public Prosecutor* [1968] MLJ 76; *Public Prosecutor v Sundaravelu* [1967] 1 MLJ 79. There must be strong grounds or substantial reasons: *Wong Swee Chin v Public Prosecutor* [1977] 2 MLJ 194 (FC). Although the decision was overturned by the Privy Council in *Wong Swee Chin v Public Prosecutor* [1979] 2 MLJ 204 (PC), no reasons were given on law, and it must be taken that the Privy Councillors that on the facts there were no strong grounds.

**[5]** We respectfully disagree with this approach. Since the petition could, as a matter of law, have been filed within ten days from 8 December 1998, the learned

judge ought to have treated the application for extension as a mere formality and the so called delay as de minimis. Instead he was looking for an explanation for the so-called delay and for a draft petition so that he could properly exercise his discretion. This was an error on his part, one that has occasioned a miscarriage of justice. If this were an appeal confined to that decision of the High Court, it would have been a matter of simply allowing the appeal and remitting the matter for hearing of the substantive appeal.

**[6]** But, as it happens, that is not the end of the matter. Before the learned judge, the conviction was attacked by way of an application under s 35 of the Courts of Judicature Act 1964 which reads:

> (1) In addition to the powers conferred on the High Court by this or any other written law, the High Court shall have general supervisory and revisionary jurisdiction over all subordinate courts, and may in particular, but without prejudice to the generality of the foregoing provision, if it appears desirable in the interests of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceeding, whether civil or criminal, in any subordinate court, call for the record thereof, and may remove the same into the High Court or may give to the subordinate court such directions as to the further conduct of the same as justice may require.
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> (2) Upon the High Court calling for any record as aforesaid all proceedings in the subordinate court in the matter or proceeding in question shall be stayed pending further order of the High Court.

**[7]** It is to be noted that the accused's application for revision was intituled in the matter of s 35 of the 1964 Act. But it would not have been fatal to his case even if he had chosen not to do so. For the powers under s 35(1) are always available to a High Court even where it initially acts under s 325 of the CPC which houses the narrower power to revise. If authority is required we need go no further than *Manokaran & Anor v Public Prosecutor* [1979] 1 MLJ 262. In that case, Abdoolcader J said:

> I have however not only extensive powers of revision in criminal proceedings under the provisions of s 325 of the Criminal Procedure Code but *even wider powers conferred by s 35 of the Courts of Judicature Act 1964*, and the deputy public prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. I would merely add that in my view notwithstanding the provisions of s 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.
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> It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to counsel on both sides at the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors* [1934] 62 IA 36 to the effect that when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order although precluded by another provision in the Criminal Procedure Code from doing so in the appeal. (Emphasis added.)

**[8]** Unfortunately, a careful reading of the judgment under appeal reveals that the learned judge adopted a narrow and restricted approach to the application for revision. This is a matter that we will deal with at some length later in this judgment. Be that as it may, it is our opinion that the decision of the High Court cannot stand for several reasons.

**[9]** First, there was evidence placed before the High Court that at the time when the accused pleaded guilty the prosecution had in their possession material which, at the very least, cast a doubt on the guilt of the accused. The material in question was a medical report by a Government doctor who had examined the accused. In his report he says that there were no signs of any penetration in the accused's anus, whether recent or old. Before us the learned deputy who did not appear either in the sessions court or before the High Court argued that penetration was not an element of an offence under s 377D of the Penal Code. With respect this submission is utterly devoid of any merit. If you look at the charge, in substance it alleges penetration. That is the particular act of gross indecency which the prosecution says brings the case under s 377D. It cannot now make a submission that is diametrically opposed to the case as pleaded in the charge sheet. So, it comes to this. The prosecution had in its possession evidence favourable to the defence. What should it do in such circumstances? The answer is to be found in the decision of the English Court of Appeal in *Dallison v Caffrey* [1965] 1 QB 348. In that case Lord Denning MR said:

> The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish. Here the solicitor, immediately after the court proceedings, gave the solicitor for the defence the statement of Mr and Mrs Stamp; and thereby he did his duty.

**[10]** In the present case, the sessions judge was denied access to information favourable to the accused. Had it been made available to her, she may well have rejected the plea of guilt on the ground that an offence may not have been committed for the want of proof of an essential allegation in the charge. For it is trite law that in a case where an accused pleads guilty, the prosecution when reciting the facts, confine itself to only those facts it can prove. See, *Abdul Kadir bin Abdul Rahman v Public Prosecutor* [1984] 1 MLJ 80; *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65. We are satisfied that the accused's conviction based on his plea of guilt may be quashed on this ground alone. But, as it happens, there are other grounds as well. And before moving onto them we must express our deep regret that the suppression of material evidence by the prosecution occurred in this case despite the reminder given by Vincent Ng JC (as he then was) in *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 322 when he said that the duty of deputy public prosecutors is (at p 336):

> ... to help the court arrive at the truth and to honour truth itself overrides any lingering ill-founded eagerness that they may harbour, to satisfy their superiors that they have

robotically objected to the objectable. Surely, the eternal question of which version if any, abides by the truth is solely and exclusively within the domain of judicial determination and not within the purview of counsel or DPPs.

**[11]** Now for the second reason. One of the grounds advanced by the accused in support of his application for revision was that his plea of guilt was involuntary in that it was not the product of a free mind but that of a mind tainted by oppression and coercion brought to bear on it by the police in whose custody he was for a period of 14 days immediately preceding his appearance before the sessions court. According to his affidavit evidence, the coercion took several forms. For example, he was told that ammunition would be planted in his house or his car and he would thereafter be charged for possession of it under the Internal Security Act 1960 which carries the mandatory death penalty. He was also told that he would be shot. He eventually succumbed to the illegitimate pressure that had been applied on him, made false statements implicating Dato' Seri Anwar Ibrahim and agreed to plead guilty to the present charge. The police had arranged counsel for him in the person of Mohamed Noor bin Don who appeared for him before the sessions court. These and other allegations made by the accused were disputed by affidavits filed by four police officers and Mohamed Noor bin Don. In this state of affairs counsel for the accused unsurprisingly applied to cross-examine the deponents of the affidavits filed by the prosecution. This application was unopposed. From the record provided to us it appears that a date for cross-examination was fixed although we are unable to find an order directing cross-examination. However, when the matter came up for hearing it was adjourned as counsel for the accused was not available. The record shows that no cross-examination took place on the adjourned date. Instead counsel for the accused made his submissions. There is no explanation on record as to why cross-examination was not proceeded with. This was surely the best way to test the veracity of the respective allegations. We make this comment because it is a rule governing affidavit evidence that once cross-examination is directed an affidavit cannot be used by the party proffering it without first obtaining leave of the court. The learned judge dealt with this part of the case as follows:

> In *PP v Audrey Keong Mei Cheng* [1997] 3 MLJ 477, the following passage appears in the judgment of the Court of Appeal (at pp 482–483):
>
> > Before leaving the subject, we would like to make one other observation. During the proceedings before the High Court, a number of affidavits were filed both by the prosecution as well as by the respondent for the consideration of the learned judge. In exercising his power under s 325 of the CPC, the learned judge has to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior court. In order to do this, he has to examine the record of the proceedings of which has been called for by himself or, as in this case, which otherwise comes to his knowledge. In exercising his discretion, the learned judge ought to confine himself only to the record of the proceedings and nothing else.
> >
> > An application for revision being essentially a criminal proceeding, it is our view that affidavit evidence has no place in such proceedings.

*PP v Audrey Keong Mei Cheng* is authority that affidavit evidence has no part in revision proceedings. Indeed no party has a right to be heard in revision proceedings: see s 326 of the Code. In *Lee Boon Gan (f) v Regina* [1954] MLJ 103, Spenser Wilkinson, J stated the principle in the following words:

> Although I can find no direct authority on the subject I am of opinion that for the purposes of an appeal the record is conclusive.
>
> Counsel for the appellant suggested that under my revisionary powers I could receive affidavit evidence in regard to this matter and affidavits were, in fact, filed by the appellant, her husband and a friend of hers and a counter affidavit was filed by the court interpreter.
>
> Whilst I am not prepared to say, as at present advised, that there are no circumstances in which the accuracy of the record can be gone into on revision, particularly under the very wide powers of revision now given to High Court by s 57 of the Courts Ordinance 1948 I did not think that this was a case in which this could or should be done. Moreover, I know of no provision of the Criminal Procedure Code which permits affidavits to be filed in a criminal appeal or upon a criminal revision unless so ordered by the High Court.
>
> There are circumstances in which certain applications can be made in appeals by motion in which case it should be proper to file affidavits in support of the motion, but in my opinion affidavits are not receivable as part of the proceedings in an appeal except in support of a specific motion.

It is evident then that the application as it stands, that is, for the Court to act in revision and set aside the conviction and sentence is misconceived. The error is apparent from a careful reading of *PP v Muhari bin Mohd Jani & Anor* [1996] 3 MLJ 116. The applicant must first be able to show an ex facie case for the exercise of revision to be undertaken. Thus the application ought to be to apply to the court to call for and examine the record under s 323 of the Code and to exercise its power under s 325 to make an order under s 317 of the Code to take further evidence. Only upon the carrying out of the revisionary exercise may the decision then be made to set aside the conviction and sentence or to make any other order as circumstances may require.

The allegations in the affidavit of the applicant were denied by Mohamed Noor bin Dom, the advocate purportedly appointed by the police; ASP Ahmad Kamil bin Dato' Ahmad; SAC Musa bin Hj Hassan; ASP Mohd. Rodwan bin Hj Mohd Yusof and C/Insp. Sampornak bin Ismail. These affidavits were filed on 18 December 1998. Given however that affidavits of Dato' Seri Anwar Ibrahim and that of Dr Zahari bin Noor were filed on 31 December 1998 and 22 January 1999 respectively supporting the affidavit of the applicant filed on 10 December 1998, and giving these latter affidavits a liberal interpretation, I conclude that at the very least the matters remain at issue. It is important to remember that affidavit evidence serves a very limited purpose, that is for setting out sworn testimony, and the court may make findings only to the extent a fact is admitted or not disputed, which differs from oral testimony tested by cross-examination where the court is in a position to assess credibility and to make a finding. In view of the fact the assertions in the affidavit evidence that the applicant has elected to proceed upon is disputed, the court must rule the allegations are not proven and cannot therefore justify ordering the conviction and sentence to be set aside as applied for.

Since the application is before me, and notwithstanding that the application as currently formulated is misconceived, I have proceeded further to consider whether I, as a judge, should act under Chapter XXXI of the Code and order that a revision be commenced. However, taking into account that Dato' Seri Anwar Ibrahim has been charged with an

offence for the same act, and that the case is pending trial in the High Court in Criminal Trial 45–52–98, I conclude it is wrong to consider a revision at this point of time. In *PP v Soon Seng Sia Heng* [1979] 2 MLJ 170 (FC) it was held that where there is an appeal to the Federal Court, an application by that person for review will be dismissed. A similar principle should apply although the accused in Criminal Trial 45–52–98 is a different person because both cases arise from the same event, and the truth is best determined in a full trial. I would therefore refrain from undertaking such a course.

**[12]** The learned deputy sought to support the above ruling by the learned judge. With respect we are unable to agree with her submissions and would make the following comment.

**[13]** In the first place, the observations of this court in *Public Prosecutor v Audrey Keong Mei Cheng* and of Spenser Wilkinson J in *Lee Boon Gan (f) v Regina* [1955] MLJ 103 appear, in our respectful view, to have been made without due consideration of s 424 of the CPC. That section provides as follows:

(1) Subject to any rules of Court, any affidavit may be used in a criminal Court if it is sworn:

(a) in the Federation before any Magistrate or Registrar;

(b) in the Republic of Singapore before any Judge, District Judge, Assistant District Judge, Registrar, Deputy Registrar, Police Magistrate or before any person authorised to take affidavits by any written law in force in the Republic of Singapore;

(c) in England, Scotland, Ireland or the Channel Islands or in any Colony, island or place (other than the above) under the dominion or jurisdiction or protection of Her Britannic Majesty, before any Judge, Court, Notary Public or other person lawfully authorised to administer oaths;

(d) in any other place before any officer exercising consular functions on behalf of the Federation.

(2) The Court shall take judicial notice of the seal or signature (as the case may be) of any Judge, Court, Notary Public, Consul, Vice-Consul or other person appended or subscribed to any affidavit.

Needless to say that the affidavits filed in the present instance meet the requirements of the section.

**[14]** In a carefully considered judgment, Abdul Malik Ishak J (as he then was) in *Ku Izham bin Ku Adnan v PP* [1998] 5 MLJ 720 correctly treated the views of this court in *Public Prosecutor v Audrey Keong Mei Cheng* as mere obiter. He also drew attention in his judgment to s 424 of the CPC and appears impliedly to have held the view that affidavit evidence is admissible on an application for revision. We would uphold Abdul Malik Ishak J's views in preference to those expressed in *Public Prosecutor v Audrey Keong Mei Cheng* and *Lee Boon Gan (f) v Regina* and emphasise that no court may override the express provisions of the CPC or indeed any other statute.

**[15]** In the second place, our Supreme Court in *Liaw Kwai Wah & Anor v PP* [1987] 2 MLJ 69 held that revisionary powers conferred by the CPC exist to correct a miscarriage of justice. This is what the Supreme Court said (at p 70):

We would also observe that the object of the revisionary powers provided for in the Code is:

> ... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals. (*Emperor v Nasrullah & Others* AIR [1928] All 287).

It is also clear that the High Court may examine the record of proceedings in the subordinate courts 'wherever it considers that in doing so the purpose of justice will be served, as for example, accused is subjected to a vexatious and groundless prosecution.' (*Ramanathan Chettiyar v Subrahmanya Ayyar* ILR 47 Mad 722).

**[16]** Further, in *Goh Keat Peng v v* [2001] 3 MLJ 172, our learned brother Zulekfli J (as he then was) said (at p 184):

> It is to be noted that the relevant provisions of the CPC and the Act (ie, the Courts of Judicature Act) have been enacted with the primary purpose of ensuring *proper conduct of the prosecution of an offence and to prevent injustice meted out on any party.* (Emphasis added.)

We agree.

**[17]** Let us apply these observations to the present instance. Here we have a case of an improper conduct of a prosecution by the intentional suppression of evidence favourable to the defence. And there can be no clearer case of an injustice where the plea of guilt is alleged to have been induced by illegitimate pressure. Statute apart, the interests of justice plainly lie in favour of permitting the admission of affidavit evidence and on the facts here directing cross-examination of the deponents of the affidavits filed in opposition to the motion for revision. Accordingly the submission by the learned deputy that affidavits are inadmissible in revision proceedings even to demonstrate a miscarriage of justice cannot be accepted. More so in this case where the prosecution itself had said that it had no objections to the deponents of affidavits filed on the Public Prosecutor's behalf.

**[18]** Now, although the learned judge in the present instance mentioned s 35(1) of the Courts of Judicature Act 1964, a reading of the judgment under appeal leaves with the impression that he did not really appreciate the nature and object of the wider supervisory jurisdiction conferred on the High Court by that section. For, in his judgment, he appears to have focussed almost entirely on the CPC and not sufficiently appreciated the wider jurisdiction conferred by s 35(1). In our judgment, the supervisory jurisdiction of the High Court conferred by s 35(1) exists to correct a miscarriage of justice. And it is central to the exercise of that power that an applicant be permitted to bring matters of complaint to the High Court by way of affidavit evidence. What was canvassed by the learned deputy and accepted by the learned judge was a very narrow approach to the nature of the jurisdiction that was being invoked. Such an approach will render the beneficial provision in s 5(1) a dead letter.

**[19]** We now come to the third reason why the accused's conviction should be quashed in this case. As stated by the learned judge in his judgment, there was another prosecution brought against the instant accused and Dato' Seri Anwar Ibrahim for committing sodomy. As a matter of history, this is what happened to that case. The High Court convicted both persons. In doing so it admitted the instant accused's confession which was, as we have already said, produced by the advocate Mohamed Noor bin Don in purported support of his plea in mitigation. An appeal to this court failed. A further appeal to the Federal Court succeeded (see *Dato Seri Anwar Ibrahim v PP & Another Appeal* [2004] 3 MLJ 405). In allowing the appeal of the instant accused, that court, by a majority held his confession inadmissible. It found the confession to have been obtained in unusual circumstances. This is what the majority held (at p 436):

> [133] Thirdly, within two days after the confession was recorded by the magistrate, the second appellant was charged for having allowed the first appellant to sodomise him in April 1998 at the latter's official residence, an offence under s. 377D of the Penal Code. Normally, it is the sodomiser (sic) who is charged or both are charged together. But, we must make it very clear that there is nothing wrong legally speaking with that charge. But again, we are only looking at all the surrounding circumstances relating to the confession.
>
> [134] Fourthly, the appointment of Mohd Noor Don as counsel for the second appellant in that case is rather unusual too. Ganesan, purportedly appointed by the second appellant's sister, had been trying to see the second appellant. He was not successful in all his attempts. Instead, he was called to Bukit Aman twice to have his statements recorded. Then we have the involvement of SAC1 Musa in the appointment of Mohd Noor Don. It is very pertinent to note that SAC1 Musa admitted that Mohd Noor Don was not appointed by the second appellant before 30 September 1998 which means that he was only appointed 11 days after he had appeared in court and 'mitigated' for the second appellant. Even if we were to accept SAC1 Musa's own evidence (even though we must say, in this respect, the second appellant's version is not improbable) does the fact that he gave Mohd Noor Don's card to the second appellant, arranged for the second appellant to call Mohd Noor Don by telephone, allowed Mohd Noor Don the use of his office to meet the second appellant, denied access by Ganesan even though at earlier stage, and also Mohd Noor Don's tendering of the confession in mitigation (we will say more about this later), the appearance of Zulkifli Nordin in court at the behest of Ganesan to see what was happening, the denial by SAC1 Musa that Zulkifli Nordin disputed the confession even though he was shown the notes of proceedings of the court, the belated letter dated 30 September 1998 (11 days after the second appellant was charged and convicted) confirming Mohd Noor Don's appointment, not raise some suspicion about the actions of the police relating to the confession?
>
> [135] Fifthly, the tendering of the confession by Mohd Noor Don 'in mitigation' of sentence in Criminal Case No 4–62–135–98 [the instant case]. Even unrepresented accused do not do such a thing, what more an advocate and solicitor representing an accused person. Tendering a confession stating that an accused has committed other offences in mitigation of sentence is a contradiction in terms, to say the least. When you are pleading for a lenient sentence, you simply do not inform the court that you have committed other offences!

**[20]** You will notice that one of the circumstances that raised the suspicion of the Federal Court was the tendering by Mohd Noor Don of the accused's confession when making the so-called plea in mitigation. If it alerted the suspicions of the Federal Court it should have had a similar impact on the High Court. The fact that it did not is a good reason for us to interfere in this case.

**[21]** Now if you compare the accused's confession which was tendered in 'mitigation' with exh P1, you will see that that the latter is substantially, if not wholly, based on the former. When this was put to the learned deputy before us, she very properly conceded that to be the case. Learned deputy however submitted that as the Federal Court's views came very much after the proceedings before the High Court in the present instance we should completely ignore those views. That in our view is a startling submission.

**[22]** It is trite that an appellate court must decide a case in the light of the circumstances existing as at the date on which the appeal is heard. If the learned deputy is right in her submission, this court must hear and determine appeals which have been rendered academic by events subsequent to the decision at first instance or at the stage of the intermediate appeal. In *Government of Malaysia v Zainal bin Hashim* [1977] 2 MLJ 254, Suffian LP said (at p 256):

> Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court and make such further or other orders as the case requires, s 69(1) and (4) of the Courts of Judicature Act No 7 of 1964. This means, on the authority of *Quilter v Mapleson* (1881–2) 9 QBD 672 that we are authorised to make such order on this appeal as ought to be made *according to the law as it stands not at the time of the trial but at the time of this appeal.* (Emphasis added.)

**[23]** It is equally trite that the judgment of a court has both prospective and retrospective effect as between parties to a dispute, whether civil or criminal. Thus in *National Westminster Bank plc v Spectrum Plus Limited* [2005] UKHL 41 Lord Nicholls of Birkenhead said:

> [4] The starting point is to note some basic, indeed elementary, features of this country's judicial system. The first concerns the essential role of courts of law. In the ordinary course the function of a court is adjudicative. Courts decide the legal consequences of past happenings. Courts make findings on disputed questions of fact, identify and apply the relevant law to the facts agreed by the parties or found by the court, and award appropriate remedies.
>
> [5] The second feature concerns the wider effect of a court decision on a point of law. To promote a desirable degree of consistency and certainty about the present state of 'the law', courts in this country have long adopted the practice of treating decisions on a point of law as precedents for the future. If the same point of law arises in another case at a later date a court will treat a previous decision as binding or persuasive, depending upon the well-known hierarchical principles of 'stare decisis'.
>
> [6] The third feature is that from time to time court decisions on points of law represent a change in what until then the law in question was generally thought to be. This happens most obviously when a court departs from, or an appellate court overrules, a previous decision on the same point of law. The point of law may concern the interpretation of a statute or it may relate to a principle of 'judge-made' law, that is, the common law (which for this purpose includes equity). A change of this nature does not always involve departing from or overruling a previous court decision. Sometimes a court may give a statute, until then free from judicial interpretation, a different meaning from that commonly held.
>
> [7] The fourth feature is a consequence of the second and third features. A court ruling which changes the law from what it was previously thought to be operates retrospectively

as well as prospectively. *The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned*, as occurred with the manufacturer of the ginger beer in *Donoghue v Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Ms Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given. (Emphasis added.)

**[24]** It follows that the observations made by the Federal Court as between the instant accused and the Public Prosecutor bind them both prospectively and retrospectively. As between them, the finding by the Federal Court that the circumstances surrounding the recording of the confession warranted the rejection of the confession is both relevant and binding. But if we accept the argument of the learned deputy before us it would mean that the same confession that was rejected in the other case may now be used to support the accused's conviction in the instant case. The proposition needs only to be stated to reveal its absurdity.

**[25]** There is also this further point. The findings by the Federal Court in favour of the instant accused on the admissibility of his confession constitute an issue estoppel against the Public Prosecutor. In our judgment, the narrower pleas of autrefois acquit and convict that are housed in s 302 of the CPC and art. 7(2) of the Federal Constitution do not exclude the application of the wider doctrine of issue estoppel to criminal cases. In *Lalta v State of Uttar Pradesh* AIR [1970] SC 1381, Ramaswami J when delivering the judgment of the Indian Supreme Court said this when considering s 403 of the Criminal Procedure Code of India, the equipollent of s 302 of our CPC:

It is manifest in the present case that the appellants cannot plead the bar enacted in s 403(1) of the Criminal Procedure Code. It is equally manifest that the prosecution of the appellants would be permitted under sub-s (2) of s 403, Criminal Procedure Code. The question presented for determination in this appeal is, however, different. The question is whether there an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of s 403(2), Criminal Procedure Code. The distinction between the principle of autrefois acquit and the rule as to issue-estoppel, in other words, the objection to the reception of evidence to prove an identical fact which has been the subject-matter of an earlier finding between the same parties is clearly brought out in the following passage from the judgment of Wright, J in *The Queen v Ollis* [1900] 2 QB 758 at pp 768–769:

> The real question is whether this relevant evidence of the false pretence on July 5, or 6 ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial, at which the prisoner was charged with having obtained money from Ramsey on that false pretence, and was acquitted of that charge.

Speaking of this type of estoppel, Dixon, J state in *The King v Wilkes* 77 CLR 511 at p 518: **A**

> Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue-estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wright, J in **B** *R v Ollis* [1900] 2 QB 758 which in effect I have adopted in the foregoing statements... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue-estoppel should **C** not apply. Such rules are not to be confused with those of res judicata which in criminal proceedings are expressed in the pleas of autrefois acquit and autrefois convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. *Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties.* It depends upon well-know doctrines which control the relitigation of issues which are **D** settled by prior litigation.

The same question was the subject-matter of consideration by the High Court of Australia in a later case *Marz v The Queen* 96 CLR 62 at pp 68–69. The question at issue was the validity of a conviction for rape after the accused had been acquitted on the charge of murdering the woman during the commission of the act. In a unanimous judgment by **E** which the appeal of the accused was allowed, the High Court stated as follows:

> It is a negation in the alternative upon which, so long as the verdict stood in its entirety, the applicant was entitled to rely as creating an issue-estoppel against the Crown. He was entitled to rely upon it because when he pleaded not guilty to the indictment of murder the issues which were thereby joined between him and the Crown necessarily raised for **F** determination the existence of the three elements we have mentioned and the verdict upon those issues must, for the reasons we have given, be taken to have affirmed the existence of the third and to have denied the existence of one or other of the other two elements. It is nothing to point that the verdict may have been the result of a misdirection of the judge and that owing to the misdirection the jury may have found the verdict without understanding or intending what as a matter of law is its necessary meaning or **G** its legal consequences. The law which gives effect to issue estoppels is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact; it does not matter that the finding may be thought to be due to the jury having been put upon the wrong track by some direction of the presiding judge or to the jury having got on the wrong track unaided. It is enough that an issue or issues have been distinctly raised and **H** found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other.

It is therefore clear that s 403 Criminal Procedure Code does not preclude the applicability of this rule of issue-estoppel. **I**

See also, *Ravinder Singh v State of Haryana* AIR [1975] SC 856.

**[26]** In *Dal Chand v State of Uttar Pradesh* [2000] Cri LJ 4579, GP Mathur J emphasised that:

The principle of 'issue estoppel' does not prevent the trial of any offence but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding has been recorded at an earlier criminal trial before a Court of competent jurisdiction.

**[27]** Before we conclude we consider it appropriate to remind magistrates and sessions judges that the recording of a plea of guilt is a solemn act that is not to be taken lightly. And for this purpose we find it appropriate to quote from two cases. The first is Heng Kim Khoon v. Public Prosecutor [1971] 1 LNS 38; [1972] 1 MLJ 30 where Sharma J said:

In taking down a plea of guilty the use of the set formula:

> Charge read over and explained to the accused and understood by him. Pleads guilty. Understands the nature and consequences of his plea. Plea accepted.

should not be the result of sheer wont and habit as if it was an empty and meaningless ritual which the pen irresistibly begins to perform and complete once the magic words 'I plead guilty' are uttered by the accused. The taking down of a plea of guilty is a solemn and serious act and the magistrates should devote some time and active thought before they decide to accept that plea and base a conviction thereon.

In the case of *Christopher Ingleson* [1914] 11 Cr App R 21 the accused was convicted of horse stealing on his plea of guilty. He handed up a statement which stated that he did not know that the horses were stolen. Lord Coleridge J in his judgment said:

> He pleaded guilty and handed up a statement to the recorder which, if believed, was a complete exculpation: it ended with the words, 'I am guilty of taking the horses not knowing that they were stolen.' If the recorder read that it was clearly his duty to explain to the prisoner that his proper course was to plead not guilty, and to have such a plea entered. We presume the recorder did not read to the end of the statement. It is most important that a prisoner should not be caught by a phrase like 'guilty'; clearly he meant that he had had no felonious intent.

Again in the case of *Alfred Golathan* [1915] 11 Cr App R 79, Reading LCJ said:

> It appears to be quite plain from reading the shorthand note that at the most he admitted entering the premises, but added that he did not do so for the purpose of stealing. That unfortunately was taken as a plea of guilty, and he was thereupon sentenced to a long term of penal servitude... In our view this man's plea was not a plea of guilty at all, and no man is to be convicted on a plea which is ambiguous. If there is any ambiguity it is to be taken as a plea of not guilty, and evidence given against him in the ordinary course. He must not be taken to have admitted his guilt unless he does so in unmistakeable terms.

In Malacca Criminal Revision No 4 of 1970, I had occasion to say:

> I like to add that when an accused person pleads guilty it is the duty of the learned magistrate to carefully consider whether the accused fully understands the nature of the charge to which he pleads guilty. A plea of guilty, as has been said, must be received with caution and generally the court should satisfy itself by putting questions to the accused in order to see whether he is aware of the facts on which the charge is founded against him and also whether he admits his guilt voluntarily without any extraneous pressure or

> expectation of a lesser sentence. An accused does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged in the charge which in law are said to disclose an offence under the section named in the charge... It is the duty of the appellate court to see that the accused had not pleaded guilty on a misconception of law or that his conviction was not founded on such evidence which did not or could not constitute the offence under the charge.

**[28]** The other authority is *Chen Chong & Ors v PP* [1967] 2 MLJ 130, where Raja Azlan Shah J (as His Royal Highness then was) said:

> The provisions of s 173(b) of the Criminal Procedure Code seem to establish the salutary rule that before a court records a plea of guilty in reply to the common form question asking the accused to plead, it is necessary for the court as a matter of discretion to consider whether it is safe to accept the plea.

**[29]** For the reasons already given, at the conclusion of argument on 14 June 2006, we allowed the appeal, quashed the conviction, set aside the sentence and ordered a re-trial.

*Appeal allowed.*

Reported by Sally Kee